

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL)	NO. 42430-4-II
RESTRAINT PETITION OF)	RESPONSE TO
)	PERSONAL RESTRAINT
JEROME D. PENDER)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Olivia Zhou, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner, Jerome Pender, is currently in the custody of the Washington Department of Corrections serving a 300 months sentence for Attempted Murder in the First Degree, imposed in Thurston County Superior Court No. 07-1-00886-5 on July 17, 2008. A copy of the judgment and sentence is attached as Appendix 1.

II. STATEMENT OF PROCEEDINGS

After the trial court entered the defendant's judgment and sentence, Pender appealed. On December 8, 2009, the Washington Court of Appeals Division II affirmed Pender's conviction in an unpublished opinion, a copy of which is attached as Appendix 2.

Review was later denied by the Washington Supreme Court on August 16, 2010.

Pender now challenges his conviction by way of a timely personal restraint petition, on the grounds that: (1) he was denied his constitutional right to effective assistance of counsel when counsel made an insufficient offer of proof, (2) he was denied due process when he was required to wear restraints during trial, (3) he was denied constitutional right to effective assistance of counsel when counsel failed to object to placing him [Pender] in restraints during trial, and (4) the trial court erred in imposing a firearm enhancement during sentencing.

III. STATEMENT OF THE CASE

The State agrees with the findings of facts set forth by this Court in the unpublished opinion upholding Pender's conviction. [Appendix 2].

IV. STANDARD OF REVIEW

In order to obtain collateral relief, a petitioner has the burden of proving an alleged error cause him actual and substantial prejudice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506

(1990). Furthermore, this is a “threshold” burden if the inmate has had a previous or alternative avenue for obtaining state judicial review of the challenged decision. In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49 (1994). As a general rule, collateral attack by personal restraint petition] on a criminal conviction and sentence should not be a reiteration of issues finally resolved at trial and direct review. In re Pers. Restraint of Gentry, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999). A petitioner may raise new issues on collateral attack, including errors of constitutional and non-constitutional magnitude. RCW 10.73.140.

Allegations unsupported by citation to authority, facts, or persuasive reasoning cannot sustain this burden of proof. Cook, 114 Wn.2d at 813-14; In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). A petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay. Gronquist, 138 Wn.2d at 396; see also In re Pers. Restraint of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

After establishing the appropriateness of collateral review, a

petitioner still has the ultimate burden of proof. The petitioner must show the existence of an error, and must show by a preponderance of the evidence that he or she was prejudiced by the asserted error. Cook, 114 Wn.2d at 814. If the petitioner fails to meet this burden, he is not entitled to relief.

V. RESPONSE TO ISSUES RAISED

4.1: Pender was not denied effective assistance of counsel at trial.

A petitioner may raise new issues on collateral attack by [personal restraint petition]. A “new” issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). For example:

“[A] defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim.”

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1(2001).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can

be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 1984). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

In his petition for relief, Pender argues that his trial counsel was ineffective because he gave an insufficient offer of proof in support of Franklin’s testimony. Specifically, Pender argues that his trial counsel should have offered Franklin’s testimony to show that the shooting occurred closer to 6 p.m. than 7 p.m. However, this argument is simply to recast the issue raised by Pender in his direct appeal in another form. In his direct appeal, Pender argued, and this Court rejected, that the trial court erred in finding Franklin’s testimony to be inadmissible. [Appendix 2]. In his statement of additional

grounds, Pender argued that Franklin's testimony should have been allowed because it established that the shooting might have occurred around 6 p.m. This argument was rejected by this Court on the basis that Pender did not preserve this argument. [Appendix 2]. However, this Court, in a footnote, stated:

“Even if Pender had presented this argument to the trial court, we could still affirm the trial court's decision on another ground. At the first trial, Franklin did not testify that the shooting occurred at 6:00 PM. Although Franklin testified that he saw someone he believed to be Pender in the area around 6:00 PM on the night of the shooting, Franklin *did not* testify that the shooting *occurred* at that time. At most, Franklin's earlier testimony revealed that the shooting had occurred some unspecified time after Franklin's work release class had started. Accordingly, Franklin's prior testimony did not establish that he had any evidence that was relevant to when the shooting itself occurred, and the trial court could have refused to allow the testimony on this basis.

Moreover, every other witness who heard or saw the shooting testified that the shooting occurred around 7:00 PM. Given these facts, no reasonable jury would have believed that the shooting occurred at 6:00 PM, and any error in excluding this evidence was harmless beyond a reasonable doubt.

[Appendix 2].

Therefore, even assuming that Pender's defense counsel was deficient in failing to make a sufficient offer of proof, Pender still

cannot demonstrate prejudice. Based on this Court's dicta and the finding of Franklin's testimony during the first trial, there is nothing to suggest that Franklin would have testified to the shooting possibly occurring around 6:00 PM. In fact, Pender cannot even show that Franklin would have conclusively testified about the shooting at all. All Franklin would have testified to would be that he observed someone like Pender at the Thurston County courthouse at 6:00 PM, which would have been rebutted by Pender's own witness, Brianna Barker.¹ [Appendix 2]. Therefore, Pender cannot show that *but for* his defense counsel's insufficient offer of proof, the trial court would have admitted Franklin's testimony.

4.2: Pender has failed to show prejudice from wearing restraints during trial.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v.

¹ Barker testified at trial that Pender was in Tacoma at 5:45 PM picking up a child from daycare, which demonstrated that Pender could not have possibly been in Olympia at 6 PM.

Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. State v. Damon, 144 Wn.2d at 691-92.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. In order to succeed on his claim, the defendant has to show the shackling

influenced the jury's verdict. State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The court in Hutchinson found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888. Similarly, the court in Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61.

An identical issue to the one at hand was addressed in In Re Pers. Restraint of Davis, 152 Wash.2d 647, 101 P.3d 1 (2004). In that case, defense counsel failed to object to the petitioner being shackled during trial. Id. at 677. It was also determined that none of the jurors saw the petitioner in shackles during the trial. Id. at 679. In Davis, after he exhausted his direct appeal, the petitioner filed a personal restraint petition arguing that it was a violation of his constitutional rights when he was shackled during trial. Additionally, the petitioner argued that it was a violation of his sixth and fourteenth

amendments to the Constitution when his counsel failed to object to the shackling. Id. at 676. In reaching its decision, the Washington State Supreme Court held:

“Where there is overwhelming evidence of guilt, on appeal, unconstitutional shackling has been held to be harmless. Because this matter comes to us as a collateral attack, after defendant has been convicted and exhausted his appeal rights, the defendant is *not* entitled, as he would have been on appeal, to a presumption of prejudice which the state would have to overcome by evidence beyond a reasonable doubt. Rather, the defendant bears the burden of showing *actual* prejudice.

Id. at 698. Additionally, in addressing the issue of ineffective assistance of counsel, the Supreme Court concluded:

Assuming that the failure to object was deficient performance, Petitioner still bears the burden of proof that his counsel’s failure to object resulted in actual and substantial prejudice...the question to be answered is whether there is a reasonable probability that, absent the error, the fact-finder would have had a reasonable doubt respecting guilt.

Id. at 700. In looking at the evidence that was presented during trial, the Supreme Court concluded that because there was overwhelming evidence of his guilt, the petitioner could not show there was a “reasonable probability, *but for* his counsel’s deficient performance by not objecting, the outcome of his trial would have been different. Id.

at 701.

In the present case, Pender has been convicted at trial and exhausted his appeal rights. Thus, he has to show prejudice; and failed to do so. Pender has failed to show that the jurors knew or saw the restraint. In his brief, Pender acknowledges that the restraint was worn under his clothing and that it was not visible while he was sitting. Pender argues that when he stood up for the jury, an outline of the device *could have* been seen. However, he has failed to show that it was *in fact* seen by the jury.

Furthermore, Pender has failed to show he was prejudiced by his trial counsel's failure to object to the restraints. During the trial, the State produced substantial amount of evidence to show that Pender was the shooter. First, Dr. Viehweg testified that after hearing shots by the Thurston County courthouse, he observed a male with a physical stature similar to Pender's running onto Lakeridge Drive. [Appendix 2]. Dr. Viehweg then observed the male getting into a vehicle within which Pender was later found. Second, Pender told the police that he had the vehicle on the day of the shooting. [Appendix 2]. Third, another State's witness, Ms. Nolan, testified she saw

someone running into her apartment complex after the shooting. Ms. Nolan later identified Pender from a photomontage as the individual that she observed. [Appendix 2]. Fourth, Detective Haller testified that Pender had a concealed weapons permit and owned a .357 Magnum firearm.² [Appendix 2]. During a search warrant of a residence that Pender often stays at, officers found a holster for a .357 firearm under the bed. Finally, Norman Field, Pender's cellmate, testified that Pender admitted that he had shot Reed at his girlfriend's request. [Appendix 2]. Therefore, because there was overwhelming evidence of Pender's guilt, he has failed to show that the restraints he wore at trial affected the jury's verdict. Additionally, Pender has failed to show that there was a reasonable probability, *but for* his counsel's failure to object, the outcome of the verdict would have been different.

4.3: The trial court did not err in imposing firearm enhancement during sentencing.

RCW 9.94A.533 provides for a term of confinement, in addition to the standard range sentence, to be imposed when the defendant was armed with a firearm (subsection (3)) or a deadly weapon other than a firearm (subsection (4)). A sentencing enhancement must be

² Surgeons recovered a .38 caliber bullet from the victim, Reed's back. This type of bullet could have been fired from a .357 Magnum revolver. [Appendix 2].

based upon a jury finding. State v. Walker-Williams, 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Pender received one firearm enhancement based upon a special jury verdict that he was armed with a firearm at the time he committed the attempted murder. [Appendix 1].

For the charge of attempted murder in the first degree, the charging language alleged that “during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.” [Appendix 3] The attempted murder charge referenced RCW 9.94A.533 (3), which specifies the time to be added when the defendant was armed with a firearm. Additionally, the charge referenced RCW 9.94A.602, which was recodified by Ch. 28 §41, LAWS OF 2009 as RCW 9.94A.825. That statute provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an

implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

In the special jury verdict, the jury answered “yes” to the question whether, at the time of the commission of the named offense, Pender was “armed with a firearm, as charged in count one.

[Appendix 7] The jury was given the following instructions:

Instruction No. 13

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime as charged in Count I. A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defense use...

A pistol, revolver or any other firearm is a deadly weapon, whether loaded or unloaded.

[Appendix 4]

Instruction No. 14

A firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

[Appendix 5]

In the closing instruction, No. 15 [Appendix 6], the jury was told to answer the special verdict form if it found the defendant guilty of the corresponding charge, but it did not refer either to firearms or deadly weapons.

Pender argues that the firearm enhancements were improperly imposed because he was not charged with a firearm enhancement, but only a deadly weapon enhancement.

The State does not dispute that a defendant must be given notice in the charging language that the firearm enhancement is being sought. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). In Recuenco, the State charged the defendant by information with second degree assault “with a deadly weapon, to-wit: a handgun” pursuant to former RCW 9.94A.125 (1983) and former RCW 9.94A.310 (1999).³ Id. at 432. At trial, defense counsel requested that a definition of a “firearm” be submitted to the jury to explain the deadly weapon definition, but the prosecutor stated that that was unnecessary because no element of a firearm was included in the charged crime or enhancement. Id. The jury returned a special

³ Former RCW 9.94A.125, *recodified* as RCW 9.94A.602, and former RCW

verdict finding that Recuenco was armed with a deadly weapon during the commission of the second degree assault. Id. During sentencing, the State requested and the court imposed a 36-month firearm enhancement rather than the 12-month deadly weapon enhancement. Id. The Washington Supreme Court vacated the firearm enhancement and remanded for resentencing reasoning that Recuenco was not given any notice that the State was seeking a firearm enhancement and the jury returned a special verdict on deadly weapon enhancement. Id. at 440.

Since Recuenco, the most recent authority from the Supreme Court regarding firearm and deadly weapon enhancements comes from State v. Williams-Walker, *supra*, in which the Supreme Court summarized its holding as the following:

Only three options exist. First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.

Id. at 901.

The Supreme Court's suggestion in Walker-Williams that a

sentencing court is to primarily look to the jury's findings for enhancement purposes can also be seen in its discussion in Recuenco. In Recuenco, the Supreme Court indicated that [Recuenco's] the argument that "there is no procedure by which a jury could have returned a constitutionally sufficient verdict supporting a firearm enhancement in his [Recuenco's] case" is not correct. State v. Recuenco, 163 Wn.2d at 437. The Supreme Court concluded that even in Recuenco's case, where notice was not sufficient, a procedure does in fact exist—under former RCW 9.94A.125 and former RCW 9.94A.310, the jury could have been asked to make a firearm finding, as an examination of these statutes makes clear. Id.

Finally, the issue of firearm and deadly weapon enhancements has been addressed by this Court in In Re Pers. Restraint of Delgado, 149 Wn. App. 223, 204 P.3d 936 (2009). In Delgado, the charging language read "armed with a deadly weapon, to-wit: a firearm." Additionally, the information cited former RCW 9.94A.510, but it did not specify that the State was charging the petitioners under former RCW 9.94A.510(3), the section relating to firearm enhancements, rather than, or in addition to, former RCW 9.94A.510(4). Id. at 229.

During trial, the jury was instructed on the definition of “deadly weapon” but not “firearm.” Id. at 236-37. This Court concluded that because the jury instructions did not define “firearm,” the jury did not actually make a finding that the petitioners were armed with operable firearms during the commission of the crimes; therefore, the sentencing court exceeded its authority by entering a sentence that does not reflect the jury’s findings. Id.

In reaching its decision, this Court looked to three legal authorities supporting the Recuenco decision: (1) the defendant’s lack of notice that the State would be seeking firearm enhancement during sentencing; (2) the adequacy of the evidence, jury instructions, and special verdict form; and (3) the defendant’s lack of notice of a firearm enhancement until sentencing. Id. at 234-235. With regards to the second legal theory, this Court reasoned that the jury would have been allowed to enter a firearm special verdict only if the State met its burden to prove the weapon used was an operable firearm. Id.

In the present case, the trial court did not err in imposing a firearm enhancement at sentencing. This case is distinguishable from Recuenco and Delgado for two reasons. In both of those cases, the

State, in its charging document, did not state the proper statute that would authorize a firearm enhancement during sentencing. In this case, however, the State's charging document stated "while armed with a deadly weapon—to wit: a firearm." Additionally, the State notified Pender that pursuant to RCW 9.94A.533 (3), it would be seeking a firearm enhancement. [Appendix 3]. Pender's position that because "deadly weapon" was included in the charging language, the court should stop reading there and ignore the word "firearm" is absurd. A firearm is a category of deadly weapon and noting RCW 9.94A.533 (3) after RCW 9.94A.602 on the information is sufficient notice of the State's intent in seeking a firearm enhancement.

In addition to differences in the notice, this case is different from Recuenco and Delgado because under the instructions given in this case, the special verdict reflects a finding that the defendant was armed with an operable firearm. The jury was given the following instructions with regard to the special verdict:

Instruction No. 13

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime as charged in Count I...

A pistol, revolver or any other firearm is a deadly weapon, whether loaded or unloaded.

[Appendix 4]

Instruction No. 14

A firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

[Appendix 5]

These instructions equated “deadly weapon” with “firearm.” This was consistent with the evidence, which showed that the victim was shot. “Instructions must always be considered and construed in connection with, and in the light of, the issues and evidence in the particular case.” Ross v. Johnson, 22 Wn.2d 275, 155 P.2d 486 (1945). Under these instructions and this evidence, the jury’s verdict reflects a finding by the jury that the defendant was armed with an operable firearm.⁴ Therefore, based on Walker-Williams, this Court should affirm the trial court’s imposition of a firearm enhancement.

In addition to arguing that the trial court erred in imposing a firearm enhancement during sentencing, Pender argues that because the special jury verdict form read whether he was “armed with a firearm,” then on remand, the trial court is precluded to impose a deadly weapon enhancement. However, that argument is misplaced.

⁴ Pender does not dispute that the weapon used in the shooting of the victim was a gun that

In support of his argument, Pender cites to In re Cruze, 169 Wn.2d 422; 237 P.3d 274 (2010).

In Cruze, the petitioner interpreted the HTACA amendments as creating two mutually exclusive sentence enhancements—one for deadly weapons and one for firearms. Id. at 429. The petitioner argued that therefore, a verdict for a firearm enhancement is not a deadly weapon sentence enhancement. Id. Because imposition of a sentence enhancement requires a corresponding jury verdict, the petitioner reasons that a special verdict finding the use of a firearm is not a “deadly weapon verdict.” Id. In response, the Washington Supreme Court denied the petitioner’s argument and held:

On their face, the HTACA amendments do not distinguish between enhancements for use of a “firearm” and for use of a “deadly weapon”; they distinguish between enhancements for use of a “firearm” and for use of a “deadly weapon *other than a* firearm.” RCW 9.94A.533(3), (4) (emphasis added). The inclusion of the “other than a firearm” language makes it clear that the HTACA treats firearm enhancements, per former RCW 9.94A.310(3), and deadly-weapon-other-than-a-firearm enhancements, per former RCW 9.94A.310(4)⁵ as two subsets of the larger category of deadly weapon enhancements...This is sufficient to make clear that the statutory scheme treated both types of enhancements, for firearms and deadly weapons other than firearms, as deadly weapon enhancements

produced a .38 caliber bullet.

⁵ Former RCW 9.94A.310 *recodified* as RCW 9.94A.510, .533.

Simply put, the HTACA did not alter the fact that a firearm is a deadly weapon and that a special verdict finding that a defendant used a firearm is a deadly weapon verdict for purposes of former RCW 9.94A.125.

Id. at 430. The holding in Cruze was followed by this Court in State v. McGrew, 156 Wn.App. 546, 559, 234 P.3d 268 (2010). In McGrew, this Court concluded that while not all deadly weapons are firearms, all firearms are deadly weapons. Id. Therefore, it held that a jury's special "armed with a firearm" verdict is also considered a deadly weapon sentence enhancement. Id.

In the present case, Pender's argument is similar to the argument raised in Cruze and McGrew. Therefore, this Court, if it determines that a remand for resentencing is needed, should follow the holding in Cruze and its own holding in McGrew and conclude that Pender should be sentenced to a deadly weapon enhancement.

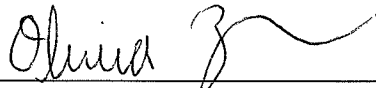
IV. CONCLUSION

Based on the above arguments, the State respectfully asks this Court to deny Pender's petition for relief. If this Court finds that the trial erred in sentencing Pender to a firearm enhancement, then the

State respectfully asks to remand for resentencing pursuant to a dangerous weapon enhancement.

RESPECTFULLY SUBMITTED this 27 day of January, 2012.

JON TUNHEIM
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Olivia Zhou", written over a horizontal line.

OLIVIA ZHOU, WSBA #41747
Deputy Prosecuting Attorney

APPENDIX 1

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SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,

vs.

No. 07-1-00886-5

JEROME CLINTON PENDER,

Defendant.

FELONY JUDGMENT AND SENTENCE (FJS)

SID:

If no SID, use DOB: 03/11/1984

PCN: 766918719 BOOKING NO. C01444475

Prison (non-sex offense)

I. HEARING

1.1 A sentencing hearing was held on 7-17-08 and the defendant, the defendant's lawyer and the deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on JULY 3, 2008
by ☐ plea ☒ jury-verdict ☐ bench trial of

COUNT	CRIME	RCW	DATE OF CRIME
I	ATTEMPTED MURDER IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.32.030(1)(a) 9.94A.602; 9.94A.533(3) 9A.28.020	MAY 14, 2007

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as charged in the ORIGINAL information.

☐ Additional current offenses are attached in Appendix 2.1.

☐ The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

☒ A special verdict/finding for use of firearm was returned on Count(s) I. RCW 9.94A.602, 9.94A.533.

☐ A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) _____
RCW 9.94A.602, 9.94A.533.

☐ A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on

FELONY JUDGMENT AND SENTENCE (FJS)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (5/2006))

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08-9-11266-0

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Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- ☐ A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- ☐ The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- ☐ This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- ☐ The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- ☐ The crime charged in Count(s) _____ involve(s) domestic violence.
- ☐ Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

None of the current offenses constitute same criminal conduct except: _____

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	N/A				
2					
3					
4					
5					

- ☐ Additional criminal history is attached in Appendix 2.2.
- ☐ The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.
- ☐ The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): _____

- ☐ The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

None of the prior convictions constitutes same criminal conduct except _____

2.3 SENTENCING DATA:

COUNT	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
I	0	XV	180-240 mos.	60 (F)	240-300 mos.	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present. ☐ Additional current offense sentencing data is attached in Appendix 2.3.

- 2.4 ☐ EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:
- ☐ within ☐ below the standard range for Count(s) _____.
 - ☐ above the standard range for Count(s) _____.
 - ☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - ☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury by special interrogatory.
- Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

- 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
- ☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
- _____

- 2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are ☐ attached ☐ as follows: _____.

III. JUDGMENT

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 ☐ The court DISMISSES Counts _____ ☐ The defendant is found NOT GUILTY of Counts _____.

IV. SENTENCE AND ORDER

IT IS ORDERED:

- 4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$ RESERVED Restitution to: _____

RTN/RJN

\$ _____ Restitution to: _____

\$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV

\$ 500.00 Victim assessment

RCW 7.68.035

\$ _____ Domestic Violence assessment RCW 10.99.080
 CRC \$ 200.00 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
 Criminal filing fee \$ _____ FRC
 Witness costs \$ _____ WFR
 Sheriff service fees \$ _____ SFR/SFS/SFW/WRF
 Jury demand fee \$ _____ JFR
 Extradition costs \$ _____ EXT
 Other \$ _____
 PUB \$ 1,500.00 Fees for court appointed attorney RCW 9.94A.760
 WFR \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760
 FCM/MTH \$ _____ Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA additional fine
 deferred due to indigency RCW 69.50.430
 CDF/LDI/FCD \$ _____ Drug enforcement fund of Thurston County RCW 9.94A.760
 NTF/SAD/SDI \$ _____ Thurston County Drug Court Fee
 CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690
 \$ 100.00 Felony DNA collection fee [] not imposed due to hardship RCW 43.43.7541
 RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000
 maximum) RCW 38.52.430
 \$ _____ Other costs for: _____
 \$ _____ TOTAL RCW 9.94A.760

The above total may not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing may be set by the prosecutor or is scheduled for _____.

[] RESTITUTION. Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:

	<u>NAME of other defendant</u>	<u>CAUSE NUMBER</u>	<u>(Victim's name)</u>	<u>(Amount-\$)</u>
RJN	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

☒ In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here:

(JLR) RCW 9.94A.760.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☐ HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 The defendant shall not have contact with MARCUS REED (10-7-84) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

☐ Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed with this Judgment and Sentence.

4.4 OTHER: _____

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

- (a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

*240 months on Count I _____ months on Count _____
_____ months on Count _____ months on Count _____
_____ months on Count _____ months on Count _____

Actual number of months of total confinement ordered is:

240 MOS*

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.) *INCLUDES CONSECUTIVE 60 MO. FIREARM ENHANCEMENT.

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

NON-FELONY COUNTS:

Sentence on counts _____ is/are suspended for _____ months on the condition that the defendant comply with all requirements outlined in the supervision section of this sentence.

_____ days of jail are suspended on Count _____
_____ days of jail are suspended on Count _____

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 COMMUNITY CUSTODY is ordered as follows:

Count I for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)	v) Residential burglary offense	
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

Pay all court-ordered legal financial obligations	Report as directed to a community corrections officer
Notify the community corrections officer in advance of any change in defendant's address or employment	Remain within prescribed geographical boundaries to be set by CCO

☐ The defendant shall not consume any alcohol and shall submit to random breath testing as directed by DOC for purposes of monitoring compliance with this condition.

☒ Defendant shall have no contact with: MARCUS REED

☐ The defendant shall undergo evaluation and fully comply with all recommended treatment for the following:

<input type="checkbox"/> Substance Abuse	<input type="checkbox"/> Mental Health
<input type="checkbox"/> Sexual Deviancy	<input type="checkbox"/> Anger Management
<input type="checkbox"/> Other: _____	

☐ The defendant shall enter into and complete a certified domestic violence program as required by DOC or as follows: _____

☐ The defendant shall not use, possess, manufacture or deliver controlled substances without a valid prescription, not associate with those who use, sell, possess, or manufacture controlled substances and submit to random urinalysis at the direction of his/her CCO to monitor compliance with this condition.

☐ The defendant shall comply with the following additional crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

4.7 ☐ **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

☐ Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 ☒ The court finds that Count I is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.8 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.9 OTHER: Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

DONE in Open Court and in the presence of the defendant this date: July 17, 2008

Judge/Print name:

Christine A. Pomeroy

[Signature]
Deputy Prosecuting Attorney
WSBA No. 16786

Print name: JOHN M. "JACK" JONES

[Signature]
Attorney for Defendant
WSBA No. 25022

Print name: CHARLES W. LANE

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: X Jerome Pender

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. _____
(If no SID take fingerprint card for State Patrol)

Date of Birth 03/11/1984

FBI No. _____

Local ID No. _____

PCN No. 766918719

Other _____

Alias name, DOB: _____

Race:

☐ Asian/Pacific
Islander

☒ Black/African-American ☐ Caucasian

Ethnicity:

☐ Hispanic

Sex:

☒ Male

☐ Native American

☐ Other: _____

☒ Non-Hispanic

☐ Female

FINGERPRINTS: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, *Denise M. [Signature]* Dated: 7-17-08

DEFENDANT'S SIGNATURE: *X Jerome Pender*

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
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APPENDIX 2

2009 Wash. App. LEXIS 3061, *

THE STATE OF WASHINGTON, *Respondent*, v. JEROME C. PENDER, *Appellant*.

No. 38012-9-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2009 Wash. App. LEXIS 3061

December 8, 2009, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at State v. Pender, 2009 Wash. App. LEXIS 3193 (Wash. Ct. App., Dec. 8, 2009)

PRIOR HISTORY: [*1]

Appeal from Thurston Superior Court. Docket No: 07-1-00886-5. Judgment or order under review. Date filed: July 17, 2008. Judge signing: Honorable Christine a Pomeroy.

CORE TERMS: shooting, identification, photomontage, ran, work release, photograph, shooter, night, gunshots, inadmissible, admissible, firearm, daycare, memory, eyewitness identification, evidentiary, harmless, faulty, started, chest, scene, tall, murder, courthouse, sweatshirt, apartment, street, drive, shot, hair

COUNSEL: Counsel for Appellant(s): *Patricia Anne Pethick*, Attorney at Law, Tacoma, WA.

Counsel for Respondent(s): *Carol L. LaVerne*, Thurston County Prosecutor's Office, Olympia, WA.

JUDGES: Authored by J. Robin Hunt. Concurring: Joel Penoyar, Dissenting: Christine Quinn-Brintnall.

OPINION BY: J. Robin Hunt

OPINION

¶1 HUNT, J. — Jerome C. Pender appeals his jury conviction for attempted first degree murder with a firearm sentencing enhancement. He argues that the trial court erred when it refused to allow him to present admissible evidence in his defense. The State concedes that the trial court erred when it excluded the challenged evidence under *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988), but it argues that we can affirm despite this error because the trial court could have excluded the evidence as confusing and misleading under ER 401 and 403. In a pro se Statement of Additional Grounds for Review (SAG), ¹ Pender further argues that his conviction cannot stand because the charging document sets out both his name and the plaintiff's designations in capital [*2] letters. We affirm.

FOOTNOTES

1 RAP 10.10.

FACTS

I. BACKGROUND

A. Previous Assault and Threats against Victim

¶2 In 2005, victim Marcus Allen Reed was in a relationship with Ashley Babbs. On December 22, 2005, after Reed had ended their relationship, Babbs broke into Reed's brother's apartment, assaulted Reed with pepper spray, and scratched her initials into Reed's car. The police arrested Babbs, and the State filed charges against her. Before her trial, Babbs called Reed repeatedly and threatened to "have some niggers fuck [him] up," if he "[went] to court on her." In January 2007, Babbs was convicted of attempted second degree assault—domestic violence. The court sentenced her on May 30, 2007.

B. Attempted Murder

¶3 Just before 7:00 PM, on May 14, 2007, Reed was walking to the work release center on Lakeridge Way in Olympia, when he noticed a tall man standing across the street, wearing a hood, and looking away from Reed. As Reed started to walk down a driveway leading to the work release center, he heard three gunshots, felt something hit him, and ran toward the work release center. As he ran, Reed glanced back and saw the man he had just seen across the street standing nearby, holding something out [***3**] in front of him with both hands. After hopping a fence and running across a building's roof, Reed ran into the work release office; the staff called 911.

¶4 Despite having been shot in the arm and the anterior chest, Reed survived. Surgeons recovered a .38 caliber bullet from Reed's back. ² This type of bullet could have been fired from a .357 Magnum revolver.

FOOTNOTES

² Although the bullet struck Reed in the anterior chest, it failed to penetrate his chest and travelled around his chest between his skin and the muscle of his chest wall, coming to rest in his back.

¶5 Later that same day, while still at the hospital, Reed spoke to Thurston County Sheriff's Office Detective David Haller. Reed initially identified the shooter as white or of a lighter-skinned race. ³

FOOTNOTES

³ Reed testified that he told Haller that the shooter was white or "[o]f a lighter gender." From the context of this statement, it is apparent that Reed was attempting to say that he told Haller that the shooter was light skinned or of a lighter-skinned race.

C. Eyewitnesses

1. Dr. Tate Viehweg

¶6 Meanwhile, sometime between 6:50 PM and 7:00 PM, on May 14, Army surgeon Dr. Tate Viehweg was driving southwest on Lakeridge Drive when he heard some gunshots [*4] and saw two men running: One man (Reed) ran across a parking lot toward the courthouse; the other man ran along a building and then turned onto Lakeridge Drive.

¶7 Viehweg made eye contact with the man who had turned onto Lakeridge Drive as the man ran past. The man was an African-American male in his early 20s, who was six feet to six foot two inches tall and weighed between 175 and 185 pounds. When Viehweg first saw him, the man was wearing a hooded sweatshirt. But, as he ran, the man removed the sweatshirt and tucked it under his arm; there appeared to be something in the sweatshirt's pocket. The man ran across the intersection into a parking lot located between two apartment buildings.

¶8 Deciding to follow the man, Viehweg watched him enter a gray four-door car bearing a license plate with the number 924-LYH. Viehweg followed the gray car for a while, but he lost sight of it when it started to go faster than Viehweg thought was safe. Viehweg then turned his car around, returned to where he had heard the gunshots, and contacted a law enforcement officer to report what he (Viehweg) had seen.

2. Lauri Nolan

¶9 Lauri Nolan lived in an apartment building across the street from where the shooting [*5] occurred. Shortly before 7:00 PM on May 14, she was on the telephone with a friend when she heard several gunshots and then saw a tall, black male with short braided hair and a black sweatshirt tucked under his right arm running up the driveway toward her apartment complex. She lost sight of the man after he ran "off the driveway."

¶10 Officers later showed Nolan two photomontages, each containing a different photograph of Pender. Nolan did not identify anyone in the first photomontage. After Nolan failed to select anyone from the first photomontage, Haller determined that Pender's hairstyle in the photograph in the first photomontage was significantly different from his hairstyle on the night of the shooting. Haller then constructed the second photomontage using a photograph of Pender that Hamilton had taken on the night of the shooting. Nolan identified Pender in the second photomontage containing the more current photograph.

D. Stop of Pender's Car; Pender's Statement

¶11 Around 9:00 PM, on the night of the shooting, Pierce County officers located and stopped a gray Mercury Marquis with the license plate number 924-LYH. Pender, who was now dating Babbs, was driving the car. Officers later [*6] learned that Babbs was the car's registered owner.

¶12 Thurston County Sheriff's Detective Steve Hamilton had been investigating the Olympia shooting ⁴ when Pierce County officers contacted him and told him that they had located the shooter's car. Hamilton drove to Pierce County and, after advising Pender of his *Miranda* ⁵ rights, interviewed him. At the time of this interview, Pender's hair was braided in cornrows.

FOOTNOTES

⁴ Hamilton's supervisor had sent him to the crime scene at 8:00 PM. Hamilton characterized the situation when he arrived as "very hectic" and stated that he was not able to gather

much information before leaving for Pierce County because the investigation had just started.

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¶13 Pender told Hamilton that (1) he (Pender) had had the Mercury Marquis all day; (2) he had worked all day in Fife; and (3) when he left work, he had driven to his mother's house in Lakewood, where he spent several hours. He denied having been in Olympia that day.

¶14 Pender allowed officers to search the Mercury Marquis, but they did not find anything related to the shooting. Because Pender did not fit the vague witness descriptions that Hamilton [*7] had at that time ⁶ and because Hamilton did not find in the car any evidence related to the shooting, Hamilton took some photographs, obtained contact information, and released Pender.

FOOTNOTES

⁶ Pender did not fit the general description of the shooter that two women, Annalisa Strago and Carrie Johnsons, had given to Hamilton. Strago and Johnson did not testify at either trial, and there is nothing in the record indicating how they had described the man they had seen at the time of the shooting. But it appears that Hamilton was aware that various witnesses had described the shooter as a "black male" and that he had some information about the man's skin tone.

E. Additional Investigation and Search

¶15 Detective Haller later learned from Pender's parents that Pender (1) was dating Babbs and sometimes stayed at her home; (2) frequently drove Babbs's car; (3) had a concealed weapons permit ⁷ ; and (4) owned a .357 Magnum firearm. Officers obtained a search warrant for Babbs's residence. Executing the search warrant, they found Babbs's Mercury Marquis in the home's garage and a holster for a .357 firearm under the bed; they never located the firearm.

FOOTNOTES

⁷ The permit was issued on March 13, 2007.

II. PROCEDURE

¶16 The [*8] State charged Pender with one count of attempted first degree murder, with a firearm sentencing enhancement. Pender moved to suppress the evidence found during the search of Babbs's residence. The trial court denied the motion to suppress the holster. ⁸ The case went to a jury trial. Pender's first trial ended in a hung jury, and the trial court declared a mistrial.

FOOTNOTES

⁸ Pender does not challenge this ruling on appeal.

A. First Trial

¶17 During the first trial, State's witness Brandon Franklin testified that at approximately 6:00 PM on May 14, 2007, he was on his way to the Olympia work release building to attend a class when he saw two young men, whom he believed to be Hispanic, sitting on some steps nearby. At some point after Franklin's class started, he and his classmates heard several gunshots. Franklin saw a man jump onto a nearby trailer and over a fence. Reed then appeared in the work release center and informed the officers present that he had been shot. Franklin later identified Pender from a photomontage as one of the men he (Franklin) had seen outside on the Olympia work release steps that evening.

¶18 Defense witness Brianna Barker ⁹ testified that at 5:45 PM on the day of the shooting [*9] Pender had picked up a child from the Tacoma daycare center where she worked. In closing, defense counsel argued that Franklin's assertion—that he had seen Pender in Olympia around 6:00 PM on May 14—demonstrated that witness identifications could be flawed because Barker's testimony clearly established that Pender had been in Tacoma at 5:45 PM and, therefore, Franklin could not have seen Pender in Olympia at 6:00 PM.

FOOTNOTES

⁹ When Barker testified at the second trial, her last name was Jones. To avoid confusion, we refer to her as Barker throughout this opinion.

B. Second Trial

1. State's Evidence

¶19 The State did not call Franklin as a witness during the second trial. In addition to the facts set out above, the State's witnesses testified about (1) the identity and description of the person they had seen running from the shooting scene, (2) the photomontage process, and (3) how long it takes to drive from Tacoma to Olympia. Pender's former jail cellmate also testified that Pender had confessed to the shooting.

a. Identifications

¶20 Viehweg described the man he had seen running from the shooting scene, which general description Pender fit. ¹⁰ But neither party asked Viehweg whether the person he had [*10] seen running from the scene was in the courtroom during the trial. There was also no evidence that Viehweg had ever identified a photograph of Pender as the person he (Viehweg) had seen the night of the shooting.

FOOTNOTES

¹⁰ Haller testified that Pender was 23 at the time of the shooting and that Pender was about six feet tall and weighed about 175 pounds.

¶21 As noted above, Nolan identified Pender's photograph in the second of two photomontages that Haller showed her shortly after the shooting. Each montage was a single sheet containing photographs of six different men; Pender was the only one included in both photomontages.

b. Timing

¶22 In anticipation of Barker's testimony, Haller testified that (1) it would have taken Pender five minutes to pick up a child at the Tacoma daycare and to take the child home; and (2) it generally takes about 35 minutes to travel from the child's home to the shooting location, depending on traffic. Haller did not testify about the specific traffic conditions around the time of the shooting.

c. Jailhouse confession

¶23 Norman Field ¹¹ admitted that he had a substantial criminal history and that he had lied to the police on at least one occasion. He testified that while sharing [*11] a jail cell with Pender, Pender had said that "he [Pender] had shot an individual that was here in the work release for his girlfriend." Ex. 63 at 154-56. Field testified that Pender said he had shot the individual at his (Pender's) girlfriend's request because he loved her.

FOOTNOTES

¹¹ Field testified at the first trial, but he was unavailable to testify at the second trial. The trial court allowed the parties to read Field's prior testimony into the record with certain redactions.

2. Defense Evidence

¶24 Pender's defense was that he was not in Olympia when the shooting occurred and that the witnesses who identified him were mistaken. To support this defense, Pender presented, (1) Barker's testimony; (2) Alisha Butler's and Jodi Lorenz's testimony indicating that they had seen a Caucasian or Hispanic man running from the shooting scene; ¹² and (3) expert testimony regarding the fallibility of expert witness testimony and the risk of misidentification when the identification process used involves the type of photomontage procedures used in this case.

FOOTNOTES

¹² In its response, the State asserts that the record shows that when Butler and Lorenz saw the running man they were not in the same place Viehweg was [*12] when he saw the man who ran past his car and, therefore, Butler and Lorenz did not see the same person Viehweg saw. Because the parties have not submitted any trial exhibits that would shed light on where Butler and Lorenz were in relation to where the shooting occurred, we cannot determine whether the State's characterization of the record is correct.

a. Admissibility of Franklin's testimony

¶25 On the second day of trial, the State asked the trial court to preclude Pender from presenting both Franklin's and Barker's testimonies. The State asserted that Pender had indicated in opening statement ¹³ that he intended to call (1) Franklin to testify that he had seen Pender in Olympia at 6:00 PM on the day of the shooting; and (2) Barker to testify that Pender was in Tacoma at 5:45 PM picking up a child from daycare, which demonstrated that Pender could not have possibly been in Olympia at 6:00 PM. The State argued that (1) Pender was improperly "calling a witness merely to impeach that witness's testimony," and that the proposed "evidence [was] immaterial and irrelevant." Report of Proceedings (7/1/2008) at 87.

FOOTNOTES

¹³ The opening statements are not part of the record on appeal. See RAP 9.2(b).

¶26 Defense [*13] counsel argued that Pender was not trying to introduce impeachment testimony but, rather, to demonstrate that eyewitness identification was not necessarily accurate. But the trial court agreed with the State that Pender was attempting to "set up a dichotomy in [his] own case," and ruled that, under *Hancock*, Pender could not present both Barker's and Franklin's testimony. Pender then elected to call Barker as a witness instead of Franklin.

b. Eyewitnesses

¶27 Barker, the site supervisor at the Tacoma Boys and Girls Club, testified that Pender frequently came to the club's daycare facility to drop off or to pick up Babbs's daughter. The daycare log from May 14, 2007, showed that Pender had picked up a child from the daycare at 5:45 PM. Barker verified that the signature on the log was Pender's.

¶28 Butler testified that at the time of the shooting, she was in Olympia to receive a "diversity award," she had heard the gunshots, and had seen the man running away from the Thurston County courthouse when she went outside because she was feeling ill. Although she testified that she had told an officer that she thought the running man was Caucasian, she acknowledged that (1) she had told the officer she [*14] could have seen something light on the man's hood rather than a light complexion; and (2) she had seen the man for only a "split second."

¶29 Lorenz testified that she was driving by the Thurston County courthouse when she heard at least four gunshots. ¹⁴ After closing her car window, she looked toward the courthouse and then turned to see a slender young man wearing a white t-shirt and jeans run across the street behind her stopped car. She testified that (1) she believed the man was five feet ten or eleven inches tall; (2) he was white, Hispanic, "or something"; and (3) he had "kind of wavy hair, longish, wavy hair."

FOOTNOTES

¹⁴ Lorenz did not testify about what time it was when she heard the gunfire.

c. Dr. Geoffrey Loftus

¶30 Dr. Geoffrey Loftus testified as a human perception, memory, and witness identification expert. He described how human memory works, how our memories are constructed from fragments of sensory information, and how memories can change over time as a result of inferences we make and additional "post-event" [*15] information we obtain. He cautioned that if a witness receives incorrect post-event information, that witness can incorporate this incorrect information into his or her memories.

¶31 In addition, Loftus testified about photomontage identification procedures in general and criticized the procedure Haller used with Nolan. Loftus described several flaws in Haller's procedure that may have placed undue emphasis on Pender's photograph and influenced Nolan's memory and her ability to provide a correct identification. Loftus also testified that studies have shown a particularly high rate of false identification related to the type of

photomontage procedures used in this case.

3. Closing Argument and Verdict

¶32 Defense counsel's closing argument focused on the reliability of the witnesses' observations, possible problems with Nolan's photomontage identification, and conflicting witness identifications. Counsel also emphasized that the jury had heard no evidence about the traffic conditions between Tacoma and Olympia just before the shooting.

¶33 The jury found Pender guilty of attempted first degree murder, while armed with a firearm. Pender appeals.

ANALYSIS

I. FRANKLIN'S TESTIMONY NOT ADMISSIBLE

¶34 Pender argues [*16] that the trial court erred when it ruled that Franklin's testimony was inadmissible under *Hancock*. He asserts that this ruling prevented presenting his defense because it precluded the jury from hearing factual evidence that the shooting had occurred at 6:00 PM rather than 7:00 PM. The State concedes that the trial court erred when it excluded Franklin's testimony based on *Hancock*, but it argues that we can affirm the trial court's decision on another ground because Franklin's testimony was inadmissible under ER 401 and ER 403. We agree.

¶35 We agree that the trial court erred when it found Franklin's testimony inadmissible under *Hancock*. But we hold that the trial court could have alternatively excluded this evidence as irrelevant to whether the other eyewitness identifications were faulty. We further hold that even if Pender had argued below that this testimony was admissible to show the shooting occurred at 6:00 PM rather than 7:00 PM, Franklin's testimony was not relevant to that issue. Because the trial court could have excluded this evidence on other grounds, there is no reversible error.

A. Standard of Review

¶36 We review the trial court's evidentiary rulings for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), [*17] cert. denied, 518 U.S. 1026 (1996). An abuse of discretion occurs when the trial court acts in a way that is manifestly unreasonable or exercises its discretion on untenable grounds or for untenable reasons. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)).

¶37 A defendant in a criminal case has a constitutional right to present relevant, admissible evidence in his defense. ER 104; *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (citing *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990)), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). Because an error in excluding otherwise relevant, admissible evidence is an error of constitutional magnitude, we evaluate whether any such error is harmless under the constitutional harmless error test.¹⁵ See *Austin*, 59 Wn. App. at 194. Additionally, we may affirm on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)).

FOOTNOTES

¹⁵ A constitutional evidentiary error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the

error; the [*18] State bears the burden of establishing harmless error in this context. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

B. *Hancock* Inapplicable

¶38 In *Hancock*, our Supreme Court held that a party cannot call a witness for the primary purpose of later impeaching that witness's testimony with otherwise inadmissible hearsay statements. *State v. Hancock*, 109 Wn.2d 760, 762-64, 748 P.2d 611 (1988). Here, the evidence contradicting Franklin's potential testimony—that he had seen Pender in Olympia at 6:00 PM on the night of the shooting—was Barker's testimony that Pender had been in Tacoma at 5:45 PM that evening. If the jury believed Barker's testimony, Pender's presence in Olympia at 6:00 PM was impossible. Thus, Barker's testimony is the relevant impeaching testimony; but because this testimony was neither hearsay nor inadmissible, *Hancock* could not support the trial court's exclusion of Franklin's testimony. That the trial court erred in relying on *Hancock*, however, does not end our inquiry.

C. Other Grounds to Affirm

¶39 The State argues that alternatively the trial court could have properly excluded Franklin's testimony as irrelevant under ER 401 [*19]¹⁶ and as confusing and/or misleading under ER 403.¹⁷ We agree that the excluded evidence was not relevant given the argument Pender presented to the trial court.

FOOTNOTES

¹⁶ ER 401 provides: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

¹⁷ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶40 At the second trial, Pender argued that he wanted to introduce Franklin's and Barker's testimonies to establish that Franklin's identification of Pender was faulty and thereby demonstrate to the jury that eyewitness identifications are not always accurate. But one witness's faulty identification is simply not relevant to whether another witness's identification was accurate.¹⁸

FOOTNOTES

¹⁸ We note that Pender does not argue on appeal and did not argue below that Franklin's testimony was relevant to whether [*20] Franklin and the other witnesses had mistaken him for another individual that they had all seen at the time of the shooting. Instead, Pender's argument, both here and below, is that Franklin's testimony would establish, in general, that witness identifications are not always accurate.

Furthermore, to the extent Franklin's testimony could have served as an example of faulty identification, this evidence was, at best, cumulative, in light of Loftus's testimony on Pender's behalf. Loftus focused on problems and risks of eyewitness identifications in

general and the photomontage in particular. Thus, even without Franklin's testimony, the jury heard evidence that eyewitness misidentifications are not unusual; it also heard about several factors that could have affected Nolan's identification, causing her to misidentify Pender as the man she saw on the night of the shooting.

¶41 Because the trial court could have excluded Franklin's testimony as irrelevant to the legal theory Pender presented, the trial court's error in relying on *Hancock* does not require reversal. Accordingly, we affirm on these alternative grounds.

D. New Argument

¶42 Pender argues for the first time on appeal that the trial court **[*21]** should have allowed Franklin's testimony because it established "that the shooting might actually have occurred at 6 PM" and, in conjunction with Barker's testimony, established that Pender could not have been the shooter. But Pender did not present this argument to the trial court when he argued for the admission of Franklin's testimony at the second trial. Instead, he stated only that he wanted to present Franklin's testimony to demonstrate that eyewitness identification can be faulty; thus, the trial court never had the opportunity to evaluate the proposed evidence on this basis. Accordingly, Pender's offer of proof below was inadequate to preserve this new argument. See ER 103(a)(2); *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991) ("It is the duty of a party offering evidence 'to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling.'" (quoting *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978))).¹⁹

FOOTNOTES

¹⁹ Even if Pender had presented this argument to the trial court, we could still affirm the trial court's decision **[*22]** on another ground. At the first trial, Franklin did not testify that the shooting occurred at 6:00 PM. Although Franklin testified that he saw someone he believed to be Pender in the area around 6:00 PM on the night of the shooting, Franklin did not testify that the shooting *occurred* at that time. At most, Franklin's earlier testimony revealed that the shooting had occurred some unspecified time after Franklin's work release class had started. Accordingly, Franklin's prior testimony did not establish that he had any evidence that was relevant to when the shooting itself occurred, and the trial court could have refused to allow the testimony on this basis.

Moreover, every other witness who heard or saw the shooting testified that the shooting occurred around 7:00 PM. Given these facts, no reasonable jury would have believed that the shooting occurred at 6:00 PM, and any error in excluding this evidence was harmless beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425-26.

II. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

¶43 In his SAG, Pender argues that his conviction cannot stand because the charging document sets out his name and the plaintiff's designation in capital letters and no such entities **[*23]** exist. Pender's SAG argument is frivolous. See *Russell v. United States*, 969 F. Supp. 24, 25 (W.D. Mich. 1997). Therefore, we do not further consider it.

¶44 We affirm.

¶45 A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENoyer, A.C.J., concur.

DISSENT BY: QUINN-BRINTNALL

DISSENT

¶46 QUINN-BRINTNALL, J. (dissenting) — I agree with the majority's holding that the trial court erred when it found Brandon Franklin's testimony inadmissible under *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988). In my opinion, a trial court's evidentiary ruling that rests on an erroneous application of law *necessarily* establishes an error under the more lenient abuse of discretion standard applicable to evidentiary matters. See *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); see also *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994) (we review evidentiary rulings for an abuse of discretion), *cert. denied*, 514 U.S. 1129 (1995). I cannot agree that, had [*24] the trial court properly applied the correct legal principles to the evidence that Jerome C. Pender presented, it would have exercised its discretion to exclude such evidence. Accordingly, I would reverse and remand for a new trial.







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APPENDIX 3

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'07 MAY 18 A9:11

BETTY J. GOSSETT

BY  DEPUTY

**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

JEROME CLINTON PENDER
DESC: B/M; 600/175; BRN/BLK
DOB: 03/11/1984
SID: UNKNOWN FBI: UNKNOWN
BOOKING NO. C01444475
PCN: 766918719

Defendant.

NO. 07-1-00886-5

INFORMATION

JOHN M. "JACK" JONES
Senior Deputy Prosecuting Attorney

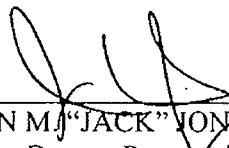
Co-Defendant
N/A

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime(s):

**COUNT I - ATTEMPTED MURDER IN THE FIRST DEGREE, WHILE ARMED
WITH A DEADLY WEAPON - FIREARM, RCW 9A.32.030(1)(a), RCW 9A.28.020,
RCW 9.94A.602, RCW 9.94A.533(3)- CLASS A FELONY:**

In that the defendant, JEROME CLINTON PENDER, in the State of Washington, on or about May 14, 2007, with premeditated intent to cause the death of Marcus Allen Reed, did attempt to cause the death of such person, and took a substantial step toward commission of this offence. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: a firearm.

DATED this 18th day of May, 2007.


JOHN M. "JACK" JONES, WSBA# 16786
Senior Deputy Prosecuting Attorney

INFORMATION

Edward G. Holm
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
360/786-5540 Fax 360/754-3348

SCANNED

0-000000005

APPENDIX 4

INSTRUCTION NO. __13__

For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime as charged in Count I

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

APPENDIX 5

INSTRUCTION NO. __14__

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

0-000000104

APPENDIX 6

INSTRUCTION NO. __15__

You will be given a special verdict form for the crime of Attempted Murder in the First Degree. If you find that defendant “not guilty” of the crime of Attempted Murder in the First Degree, then do not use the special verdict form. If you find the defendant “guilty” of the crime of Attempted Murder in the First Degree, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”. If you unanimously have a reasonable doubt as to this question you must answer “no”.

APPENDIX 7

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

'08 JUL -3 P2:38

BETTY J. GOULD CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JEROME CLINTON PENDER,

Defendant.

NO. 07-1-00886-5

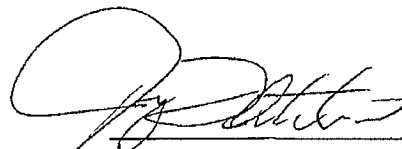
SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows

QUESTION: Was the defendant, JEROME CLINTON PENDER, armed with a firearm at the time of the commission of the crime as charged in Count I.

ANSWER: Yes (write in YES or NO)

DATE: 7/3/08


PRESIDING JUROR

0-000000108

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Response to Personal Restraint Petition, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

JEFFREY E. ELLIS, ATTORNEY FOR APPELLANT
EMAIL: JEFFREYERWINELLIS@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of January, 2012, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

January 27, 2012 - 11:38 AM

Transmittal Letter

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Court of Appeals Case Number: 42430-4

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Affidavit

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